IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Writ Petition No. 2397 of 2004

M/s Kanak Exports
a partnership firm registered
under the Indian Partnership
Act l932 having its principal
place of business at l27
Maker Chambers lll, Nariman Point
Mumbai .40002l ..Petitioners

vs

l. Union of India
through the Joint Secretary
Ministry of Law and Justice
Aayakar Bhavan, M K Road
Churchgate, Mumbai .400020
2. The Director General of
Foreign Trade, Udyog Bhavan
New Delhi
3. Jt Director General of
Foreign Trade, New C.G.O
Building New Marine Lines
Churchgate, Mumbai 400020... Respondents

Mr R.A.Dada, Sr Counsel with Mr Vikram Nankani, Mr.Chetan Kapadia and mr.I J Nankani i/b M/s Nankani and Associates for petitioners.

Mr. B.A.Desai, Additional Solicitor General with Mr A.M.Sethna and Mr. Suresh S Pakale for respondents.

CORAM: A.P.SHAH & S.J.VAZIFDAR JJ.

Dated 4.7.2005

Oral Judgment (Per A.P.Shah J.):

. On 3lst March 2003, the Central Government announced "Special Strategic Package for Status Holders", hereinafter for brevity's sake referred to as "the scheme" under the Exim Policy 2002-2007.The term "Status Holder" is defined by para 9.53 of the amended policy to mean an exporter recognized as Export House/ Trading House by the Director General of Foreign Trade (DGFT)/ Development Commissioner or Star Trading House/ Super Star Trading House recognized by the DGFT.

2. The scheme provides certain special facilities for status holders. For the purpose of the present

petition the other facilities are not relevant but we are concerned with the following facility as incorporated in para 3.7.2.l (clause vi) which reads as follows:

> "(vi) Duty free import entitlement for status holders having incremental growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs.25 crores (in free foreign exchange). The duty free entitlement shall be l0% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipments and inputs for their own factory or the factory of the associating/ supporting manufacturer/ job worker. The entitlement/ goods shall be transferable".

3. By the Notification No.28 (RE-2003)/ 2002- 2007 dated 28th January 2004 issued by the Central Government in exercise of the power conferred under section 5 of the Foreign Trade (Development and Regulation) Act, l992, hereinafter referred to as

"the Act", the Central Government amended the provisions of para 3.7.2.l by inserting Note 1 to Note 5 to para 3.7.2.l. Note 1 provides that for the purpose of calculating the value of exports, the exports mentioned therein shall not be taken into account. Note 2 bars transfer of incremental growth of exports by an exporter directly or indirectly to any other exporter.Under Note 3 the Government reserved the right in public interest to specify the export of product which shall not be eligible for calculation of incremental growth/ entitlement or notify means of growth which shall not be allowed for under the scheme. Note 4 provides that the guidelines contained in Notes l to 5 will be applicable to the exports made on or after lst April 2003 . On the same day the DGFT issued Public Notice No.40 (RE-2003) / 2003-2007 in exercise of his power conferred under the provisions of para 2.4 of the policy by inserting para 3.2.6(A) to add conditions for the eligibility and entitlement under the said scheme. The Public Notice sought to exclude export performance in relation to four classes of goods mentioned in para 2 thereof from computation of entitlement under the scheme and at the same time sought to disallow the import of agricultural products falling under Chapter l to 24

of ITC (HS) under the said scheme.

4. By Notification No.38(RE-2003)/ 2003- 2007 dated 2lst April 2004 read with Notification No. 40 (RE-2003)/2002-2007 dated 23rd April 2004, the Central Government sought to exclude the export performance related to class of goods covered by para 2 of the Public Notice dated 28th January 2004 by way of Note 6 to para 3.7.2.l of the scheme and likewise it prohibited the import of agricultural products under the scheme by way of Note 7 to para 3.7.2.l as was sought to be done by para 3 of the Public Notice dated 28th January 2004.

5. The validity of the aforesaid Notifications and Public Notice is the primary issue in this petition.

6. According to the petitioners pursuant to the said scheme as contained in Exim Policy during the period lst April 2003 to 3lst April 2004 the petitioners undertook export of various items to the tune of Rs.l070 crores which included export to the extent of Rs.735.82 crores till 27th January 2004. It is the petitioners' case that the impugned Notifications which are in the nature of subordinate /delegated legislation cannot have retrospective

effect in the absence of power conferred by Parliament to do so. Therefore the impugned Notifications which are made applicable to the exports made on or after lst April 2003 are ultravires. According to them the Central Government cannot in the garb of clarification impose new and fresh conditions for the first time which did not exist at the time when the scheme was announced or at the time when the petitioners had made exports based on the scheme. Further according to them under the scheme the entitlement is contingent upon achieving the incremental growth of more than 25% in the value of export and, therefore, no sooner the prescribed minimum limit is achieved or crossed the right to receive the entitlement is crystallized or vested and such vested right cannot be taken away or whittled down by any subsequent changes or amendments.

7. According to the respondents,on the other hand, the Government received a report that some status holders were trying to increase their turnover by taking credits for the exports of others without putting any significant efforts for increasing the export. Such transactions amounted to misuse of the scheme. Considering this aspect in mind these

clarifications were issued by way of the impugned Notifications and Public Notice. According to them by issuing clarifications certain types of exports which are merely paper exports and which do not lead to genuine incremental growth have been kept outside the purview of the scheme. This has been done in public interest and in exercise of power conferred under section 5 of the Act.

8. Mr.Dada, learned Senior Counsel appearing for the petitioners and Mr. B.A.Desai, learned Additional Solicitor General advanced extensive oral submissions before us and referred to number of decisions of the Supreme Court and High Courts.The oral submissions were also supplemented by written submissions . Before adverting to the submissions made by the learned counsel, it is necessary to notice certain relevant provisions of the Exim Policy.

9. In exercise of power conferred by section 5 of the Act, the Central Government notified the Export and Import Policy for the period 2002-2007. This policy was brought into force with effect from lst April 2002 and is to remain in force upto 3lst March 2007 and will be co-terminus with Tenth Five Year

Plan (2002- 2007).However, the Central Government has reserved the right in public interest to make any amendment to the policy in exercise of the power conferred by section 5 of the Act. Such amendment shall be made by means of a notification published in the Gazette of India. Para l.4 of the policy lays down the principal objective as under:

> "l.4 The principal objective of this policy are: (i) To facilitate sustained growth in exports to attain a share of at least l% of global merchandise trade. (ii)To stimulate sustained economic growth by providing access to essential raw materials, intermediates, components, consumables and capital goods required for augmenting production and providing services.
>
> (iii)....."

l0. Para 2.4 of the policy provides that:

> "The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by

> an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and this policy. Such procedure shall be included in the Handbook (Vol.l), Handbook (Vol.2) Schedule of DEPB Rate and in ITC (HS) and published by means of a Public Notice. Such procedure may, in like manner, be amended from time to time".

ll. Para 2.34 provides that 3rd party exports, as defined in para 9.55 shall be allowed under the policy. Para 4.7.l deals with the status certificate and provides that Merchants as well as Manufacturer Exporters, Service Providers, Export Oriented Units (EOU's) / United Located in Special Economic Zones (SEZ's) / Agri Export Zone (AEZ's) / Electronic Hardware Technology Parks (EHTPs) /Software Technology Parks (STPs) shall be eligible for such recognition. Para 3.7.2.l relevant context of which is already quoted in para 2 of the judgment enumerates several facilities for which the status holders are entitled. For duty free import entitlement the status holders having incremental

growth of more than 25% in FOB value of exports (in free foreign exchange) subject to a minimum export turnover of Rs. 25 crores (in free foreign exchange) are eligible. Duty free entitlement shall be l0% of the incremental growth in exports. Such entitlement can be used for import of capital goods, office equipments,inputs for their own industry or industry of the associate/supporting manufacturer / job worker. The entitlement / goods shall not be transferable.

l2. Para 4.l provides for duty exemption/ remission schemes. Para 4.4 contains a schemes for diamond and jewelry. Paras 6.l and 6.2(a) deal with exports by EOU/EHTP/STP. Para 6.l0 recognizes exports by EOU/EHTP/STP through the status holders. Part 7.8(a) deals with export by SEZ units and para 7.l0 recognizes exports by SEZ Units through the status holders. The term "status holder" is defined in para 9.53 which is already referred to earlier. Para 9.55 states that third party exports means exports made by an exporter or manufacturer on behalf of another exporter(s). In such cases, shipping bills shall indicate the name of both the exporter/manufacturer and exporter(s). Para 3.25 prescribes procedure for duty free credit

entitlement for status holders. The application for duty free credit certificate shall be made in Appendix l7D. The duty free entitlement certificate shall be valid for a period of l2 months. The status holder shall within one month of the expiry of the validity of duty free entitlement submit a certificate of import made under the certificate as per Appendix l7A to the Jurisdictional Regional Licensing Authority.

l3. By the impugned Notification dated 28th January 2004, clause (vi) of para 3.7.2.l is retained in the same terms but Notes l to 5 are added to the same.The challenge in the present petition is restricted to Note 1 clauses (ii), (v) (vi) and (vii) and Note 4 which read as follows:

> "Note 1: For the purpose of calculating the value of exports, the following exports shall not be taken into account namely.
>
> (i).....
>
> (ii) Export turnover of units operating under SEZ/EOU/EHTP/STP schemes or produces manufactured by them and exported through DTA units.

(iii).....

(iv).....

(v) Supplies made by one status holder to another status holder

(vi)Export performance made by one status holder on behalf of other status holder will not be eligible for entitlement under the scheme.

(vii) Supplies made or export performance effected by a non-status holder (Merchant exporter/ Manufacturer with any export performance in 2003-2004) to a status holder if the applicant as well as the non status holder have less than 25 percent incremental growth over their respective previous years direct export turnover.

Note 2.....

Note 3.....

Note 4- These guidelines will be applicable to the exports made on or after l.4.2003".

l4. By Public Notice No.40 dated 28th January 2004 issued by the DGFT in exercise of power conferred under para 2.4 of the policy, export of certain

products for calculation of entitlement as well as import of certain products was excluded from the purview of the duty free entitlement certificate for status holders. Paras 2 and 3 of the Public Notice which are material for the purpose of this petition read as follows:

> "2. In terms of Para 3.2.5 of Handbook of Procedure (Volume I), the following items would not be taken into account for computation of entitlement and export performance under Duty Free Credit Entitlement Scheme for Status Holders:
>
> a. Rough, uncut and semi polished diamonds.
> b. Gold, silver in an form including plain jewelry therefore;
> c. Food grains sourced from central pool maintained by FCI
> d. Items exported under free shipping bills.
> 3. In terms of Para 3.25 of Handbook of procedure (Volume I), the following items would not be allowed for imports under duty Free Credit Entitlement

Certificate for Status Holders:

a. Agricultural products which fall under Chapters l.24 of ITC (HS) Classification of Export and Import items".

l5. In exercise of power conferred under section 5 of the Act the Central Government issued the impugned Notifications dated 2lst April 2004 & 23rd April 2004 to exclude export performance related to classes of goods covered by para 2 above of the Public Notice dated 28th January 2004 by way of Note 6 to para 3.7.2.l of the scheme and likewise it prohibited import of agricultural products under the scheme by way of Note 7 to para 3.7.2.l as was sought to be done by para 3 of the Public Notice dated 28th January 2004.

l6. Mr Dada, learned Senior Counsel appearing for the petitioners submits that a delegated or subordinate legislation can operate only prospectively and not retrospectively. He submits that unless a statute conferring power to make rules provides to make rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. Therefore according to

him, Note 4 giving retrospective effect to the amendments vide Notifications dated 28th January 2004 read with Notification dated 2lst and 23rd April 2004 is ultravires section 5 of the Act. In support of his submission he relies upon the decisions of the Supreme Court in State of Bihar vs Krishna Kumar Kabra (l997) 9 SCC 763, The Cannannore Spinning and Weaving Mills Ltd vs Collector of Customs and Central Excise, Cochin and ors (l969) 3 SCC ll2, The Income Tax Officer,Alleppy vs M C Ponnoose and ors, AIR l970 SC 385 and State Bank of India vs S.Vijaya Kumar, (l990) 4 SCC 48. He submits that the Supreme Court in Accountant General vs S.Doraiswamy, (l98l) 4 SCC 93 held so even in the context of clause (v) of Article l48 of the Constitution of India. It is submitted that the Public Notice issued by the DGFT is wholly without jurisdiction as the DGFT does not have power to put conditions, which do not exist in the policy or restrict or control export or import of goods. Mr Dada submits that the salient features of the scheme are clear, simple and unambiguous. The expression "incremental growth" is defined and well understood. The definition of "status holder" covers a merchant, manufacturer and EOU/SEZ. The Circular No. l6 dated 24th December 2002 issued by the respondents

also clearly states that third party exports are eligible for the export promotion schemes. It would, therefore, mean that the scheme covers exports by a merchant, manufacturer and EOU/SEZ. According to Mr Dada all those exports which qualify for obtaining status certificate also qualify for determining the incremental growth in the export turnover under the scheme. He submits that the amendment seeks to exclude 8 categories of exports and 4 categories of items expressly or by implication. Therefore the amendment cannot be described as merely clarificatory. He submits that merely because benefits accrued upon achieving the prescribed incremental growth is deferred to a future date, it does not mean that there is no vesting of right. The right is vested in a status holder as soon as he achieves the prescribed incremental growth and just because the benefit in the form of duty free certificate is to be issued to the status holder after lst April 2004 as contended by the Government, it does not mean that no right is vested in the status holder to receive the duty free certificate upon achieving the incremental growth. In this connection he relies upon the decision of the Supreme Court in Chairman, Railway Board and ors. vs. C.R.Ranga Damaiah, (l997) 6 SCC 623,

Bejgam Veeranna Venkata Narasimloo vs State of Andhra Pradesh, (l998) l SCC 563 and Samtel India Ltd vs Commissioner of Central Excise (2003) l55 ELT l4. Mr. Dada also relies upon the decision of the Madras High Court in Adani Exports Ltd vs Union of India, (2003) l5l ELT 520 and a decision of the Division Bench of this court in Arviva Industries (I) Ltd vs Union of India, (2004) l67 ELT l35. Mr. Dada submits that the amendments are even otherwise arbitrary, unreasonable and violative of Article l4 of the Constitution. Lastly he submits that relying upon the representation made by the Central Government exports were effected by the petitioners. The Central Government is therefore bound by the doctrine of promissory estoppel and cannot be permitted to take away the benefits after the exports have been completed. He places reliance upon the decision of the Supreme Court in State of Punjab vs. Nestle India Ltd ,(2004) 6 SCC 465.

l7. On the other hand, learned Additional Solicitor General contends that there is express conferment of power on the Central Government under section 5 of the Act, inter alia, empowering the Government to make amendment to the policy by issuing notifications from time to time. This power is to

be exercised by the Central Government in public interest as is also evident from the preamble of the Export and Import Policy of 2002- 2007. The learned Additional Solicitor General submits that the scheme was not intended to encourage the status holder - export house to pool the exports made by the other exporters for the purpose of showing incremental growth in the exports. He submits that reports were received by the Department of Revenue that the status holders were purchasing exports made by other parties at a premium with a view to show incremental growth in the exports without having actually achieved such growth. Therefore the impugned Notifications and Public Notice have been issued with a view to clarify the aspect as to how the incremental growth in export should be reckoned. According to him the Notifications are merely clarificatory. Therefore the question of giving any retrospective operation to the Notifications would not arise. Learned Additional Solicitor General heavily relies upon an unreported decision of the Division Bench of the Gujarat High Court in Adani Exports Ltd vs. Union of India (Special Civil Application No. l676 of 2004 decided on 23rd July 2004) where the Division Bench while construing these very Notifications held that the amendment

made vide Notes l to 5 is only clarificatory. It is submitted that no right is vested in the petitioners until a licence is actually granted. There is exhaustive procedure laid down for making an application for grant of entitlement certificate. It is only after the application for entitlement is processed and licence is issued, then the right to entitlement is crystallized and accrues as a vested right in favour of an exporter by actual grant of a licence. Reliance is placed upon the decisions of the Supreme Court in PTR Exports (Madras) Pvt Ltd and ors vs Union of India, (l996) 5 SCC 268, S.B.International Ltd and ors vs Asst Director General of Foreign Trade and ors, (l996) 2 SCC 439 and State of Rajasthan and anr vs J K Udaypur Udyog Ltd and anr, 2004 (7) SCC 673. Reliance is also placed upon the observations of the Supreme Court in the case of Trimbak Damodar vs Asaram Hiraman , AIR l966 SC l758 explaining distinction between the existing right and vested right. In any event according to learned Additional Solicitor General the power to amend retrospectively is implicit in section 5 itself and the word "amend" used in section 5 read with section 3 which confers power upon the Central Government to regulate, is sufficient indication that the Central Government is

empowered to make subordinate legislation retrospectively. In this connection he refers to the decision of the Supreme Court in H C Suman and ors vs Rehabilitation Ministry Employees Cooperative House Building Society Ltd New Delhi and ors (l99l) 4 SCC 485 and State of Tamil Nadu vs Hindstone and ors (l98l) 2 SCC 88. He submits that the retrospective operation given to the Notifications is also sustainable under sections l4 and 2l of the General Clauses Act. Learned Additional Solicitor General submits that there is nothing arbitrary or irrational in the impugned notifications and Public Notice and same have been issued in public interest. As regards the doctrine of promissory estoppel, learned Additional Solicitor General relying upon the decision of the Supreme Court in Kasinka and anr vs Union of India and anr (l995) l SCC 274 and The Sales Tax Officer and anr vs Shree Durga Oil Mills and anr (l998) l SCC 572 contends that the doctrine of promissory estoppel will not be applicable if the change in the stand taken by the Government is on account of a public policy and in case there is supervening public equity, the Government can change its stand and withdraw the representation made by it, even if such a change or withdrawal would affect certain persons. He contends that in the present

case there is no promise because the Exim Policy and section 5 of the Act clearly says that the policy can be amended at any time.

l8. In the light of the submissions made at the Bar, the first issue which falls for our consideration is whether the Notification No.28 dated 28th January 2004 is invalid on the ground that same has been issued by the Central Government seeking to amend the policy with retrospective effect. According to Mr.Dada the impugned Notification dated 28th January 2004 is not clarificatory but amounts to taking a fresh look of the matter in the light of some doubts having arisen and same cannot be permitted to be applied in the garb of clarification with retrospective effect whereas according to learned Additional Solicitor General the notification has been issued merely to clarify the scope of the scheme with a view to stop its abuse by certain exporters. The question therefore is whether the Notification of 28th January 2004 has the effect of introducing a new condition or term or it is merely in the nature of clarification to the existing policy. At this stage it is necessary to refer to the basic objective of the scheme as contained in Commerce and Industry

Minister's speech on introducing new Exim Policy on 3lst March, 20034 which reads as under:

> "We recognize that the status holders will continue to play a significant and increasing role in boosting exports, particularly from the small scale sector, as most of the small scale units will not be in a position to directly access the international markets. Moreover, it will be our endeavor to facilitate India emerging as a major base for out sourcing products and services for the rest of the world. They are also critical to our strategy for accelerating the rate of incremental growth of export. Therefore, we intend to give a premium to the status holders who achieve high growth rate in their exports. It is proposed to give a duty free entitlement to them for import of capital goods,spares, office equipments and consumables. /This will be available to status holders who achieve a growth rate of 25% or more in the current year with a minimum export performance of Rs.25 crores.They would be

> entitled to a duty free entitlement of l0% of the incremental growth in exports during the current financial year. This entitlement would be subject to actual user condition which can be passed on to associate manufactures".

l9. The reasons for making clarification are contained in para 5 of the impugned Notification. It appears that after the scheme was initiated, on the basis of intelligence gathered the Central Government learnt that the scheme was being mis-used by certain status holders by entering into contracts with various exporters showing themselves as third party exporters. Such contracts were executed on stamp papers ostensibly showing such status holders as third party exporters helping other parties in obtaining the orders. These contracts were found to have been entered into between the parties as merely a paper arrangement with a view to claim benefits of duty free credit entitlement on the export of others. It also came to notice that the status holders were purchasing exports made by other parties at a premium with a view to show incremental growth of 25% or more in exports without having actually achieved such growth. In the face of this

clear abuse of the scheme the Central Government had to intervene and issue the impugned Notification to clarify the correct meaning of the scheme. Note 2 of the Notification provides that incremental growth of exports by an exporter shall not, directly or indirectly, be transferred to any other exporter i.e.exporter's own incremental growth will be counted for entitlement. The petitioners have not challenged the validity of Note 2. What is challenged is the validly of Note l which states that for the purpose of calculating the value of certain exports shall not be taken into account in respect of sub-clauses (ii), (v), (vi), and (vii) thereof.

20. It appears that till 2002-2003 the petitioners' export performance was going down steadily. In 2002-2003 the export of the petitioners was hardly Rs.27 crores. In the year 2002-2003 India's export increased by 22% whereas as compared to the petitioners' export of about Rs.27 crores in 2002-2003,it catapulted to more than Rs.l000 crores. The national export growth rate was only 22% while the petitioners' exports grew at more than 3800%. It is obvious that this growth is merely a paper growth and not incremental growth within the meaning

of the scheme. Notification dated 28th January 2004 does not make any third party export illegal or entirely ineligible for getting incentives under the Exim Policy. However, the basic intention of the amended scheme was to encourage the export of products manufactured by small scale units who do not have access to the international market because of lack of required international marketing expertise and optimum resources to have presence in the international marketing arena. The scheme was not intended to encourage the status holder/ export house to pool the exports made by other exporters for the purpose of showing incremental growth in the export. The clarification issued by the impugned Notification in so far as it provides that supplies made by one status holder to another status holder or export performance made by one status holder on behalf of another status holder shall not be eligible for entitlement is in consonance with the basic object of the scheme. The export turnover of the units operating under STZ/EOU/EHTP schemes was also excluded as these units are getting all facilities for import without payment of duty on various types of goods including capital goods required by them for their activities. The intention of the makers of the scheme was not to

confer double benefit under para 3.7.2.l. Further an exporter is required to export himself and not benefit from export capabilities of STZ/EOU/EHTP etc.This would be only paper growth and amount to abuse of the scheme. Reliance placed by the petitioners on Circular No l6 dated 24th December 2002 is also of no assistance as the said Circular stating that 3rd party exports are eligible for all the export promotion schemes was issued long before the special incentive scheme was announced on 3lst March 2003. In our opinion, the provisions contained in the impugned Notification dated 28th January 2004 are merely clarificatory and cannot be treated as amendment to the scheme.

2l. We are also supported in our view by the judgment of the Division Bench of the Gujarat High Court in Adani Exports Limited vs Union of India (supra). Paras l7 and l8 of the said judgment which are material read as under:

> "l7. Under the policy in force prior to the impugned notifications and even thereafter the third party exports are permitted. What was legal earlier is not made illegal at all.For instance, exports

of goods manufactured by units in EOU/SEZ zones through status holder are not prohibited but such exports even made between l.4.2003 and 27.l.2004 are excluded because the benefit of duty free import was already availed for the export of such goods. Chapter 6 of the Exim Policy relates to Export Oriented Units (EOUs). Electronics Hardware Technology Parks (EHTPs), and Software Technology Parks (STPs). As provided in paras 6.l and 6.8 of the Exim Policy, these units undertake to export their entire production of goods and services, except permissible sales in the Domestic Tariff Area as per the Exim Policy. Para 6.2(b) of the Exim Policy provides that "an EOU/EHTP/STP unit may import without payment of duty all types of goods, including capital goods, as defined in the policy,required by it for its activities as mentioned in para 6.l..." Para 6.l0 reads as under:

"6.l0 As EOU/EHTP/STP unit may export goods manufactured/ software developed by

it through a merchant exporter/status holder recognized under this policy or any other EOU/EHTP/SEZ unit".

The amendments do not impinge upon the right of any party to export its goods in accordance with the Exim Policy.The clarification only excludes exports which were never intended in the first place to be covered by the Special Scheme under consideration.

l8. Secondly, the misuse of the scheme by mere paper growth in exports is not to be countenanced. Hence, it is but natural that the notification dated 28.l.2004 would apply to the exports made from l.4.2003 onwards. In so far as this court holds that the Notes l and 2 read with Note 4 introduced by the notification dated 28.l.2004 are merely clarificatory, the exports made by the petitioners between l.4.2003 and 27.l.2003 would certainly be covered by the said notes. Two views are possible about the expression "incremental growth

> in exports by 25%" and the Government adopted the interpretation as reflected in the notification dated 28.l.2004 which is quite in consonance with the object of the Act, Exim Policy and the incentive scheme rather than the interpretation canvassed by the petitioner.Hence, there is no substance in the challenge to a Notes l and 2 read with note 4."

22. The submission of Mr. Dada that the imopugned Notification is unreasonable and irrational is also without any substance. It is well settled that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore its validity cannot be tested on any rigid prior considerations or on the application of any straight-jacket formula. In Balco Employees Union (regd) vs Union of India and ors, (2000) 2 SCC 333, the Supreme Court held that Laws, including Executive Action "relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech religion etc., that the legislature should be allowed some play in the

joints because it has to deal with complex problems which do not admit of solution through any doctrine or straight-jacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature In the circumstances, the challenge to the Notification dated 28th January 2004 is liable to be rejected.

23. Coming then to the Notes 6 and 7 added by Notification dated 2lst April 2004 read with Notification dated 23rd April 2004 and Public Notice dated 28th January 2004 in so far as they exclude certain export products from the scheme cannot be said to be mere clarification. The four items sought to be excluded from the purview of the scheme are (a) rough, uncut and semi polished diamonds, (b) gold, silver in any form including plain jewellery thereof, (c) food grains resources from central pool maintained by the FCI, and (d) items exported under free shipping bills. Out of these four items few have been exported by the petitioners. When these items were sought to be first excluded, it was done by way of Public Notice issued by the DGFT. The DGFT has no power to do so under section 5 read with

section 3 of the Act. In Narendra Udeshi vs Union of India (2003) l56 ELT 8l9, the Division Bench of this Court has held that DGFT does not have power to put conditions which do not exist in the policy or restrict or control export or import of goods. The power of DGFT is only to be exercised for procedural purpose as is evident from para 2.l4 of the policy. Para 3.2.6 inserted by Public Notice dated 28th January 2004 obviously goes beyond the procedural conditions as these conditions are not found in the policy. There is nothing in the policy to indicate that any of these items were excluded from the scheme. Realizing that DGFT had no power to impose new conditions under the Act the Central Government has issued Notifications dated 2lst/23rd April 2004 in exercise of power conferred by section 5 of the Scheme to exclude aforesaid four items. Notifications dated 2lst/23rd April 2004 are new and independent notifications issued under section 5 of the Act and cannot have retrospective effect by virtue of Note 4 which was earlier inserted by Notification dated 28th January 2004.

24. It is now well settled that a delegated or subordinate legislation can apply only prospectively and not retrospectively. Unless rule- making

authority has been vested with power under a statute to make rules with retrospective effect, rules cannot be given retrospective operation. In Accountant General and anr vs Doraiswamy (supra), a three Judge Bench of the Supreme Court held that unless the statute conferring power to make rules provide for making of the rules with retrospective operation, rule made pursuant to that power could have prospective operation only. Similar is the view taken in State of Bihar and ors vs Krishna Kumar Kabra and anr, Connonnore Spinning and Weaving Mills Ltd vs Collector of Customs and Central Excise, Cochin and ors, The Income Tax Officer Alleepy vs M C Vijayakumar and State Bank of India vs S Vijaya Kumar (supra). Therefore amendments effected by the said Notifications dated 2lst/23rd April 2004 would have prospective operation only.

25. Learned Additional Solicitor General has not disputed that section 5 of the Act does not specifically confer power upon the Central Government to make rules retrospectively. However, according to him the word "amend" used in section 5 read with section 3 which confers power upon the Central Government to regulate, incorporates in it entrustment of the power to make subordinate

legislation retrospectively. According to him the power of the Central Government under the said legislation is as wide and as extensive as the amending power of the legislature itself. He relies upon the observations of Chinnappa Reddy J. in the case of State of Tamil Nadu vs Hindstone and ors (supra) that "A statutory rule,while ever subordinate to the parent statute is otherwise, to be treated as part of the statute and as effective. Rules made under the statute must be construed for all purposes of construction or application exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or application". He also relies upon the judgment in H C Suman vs Rehabilitation Ministry (supra). Learned Additional Solicitor General also seeks to invoke provisions of sections l4 and 2l of the General Clauses Act to justify the retrospective operation.

26. We are unable to accept the submissions of learned Additional Solicitor General. The word "amend" does not give power to make amendment retrospectively if it is used in relation to the power to make a piece of delegated legislation. The

connotation of the word "amend" when it is used for the exercise of power by a legislature cannot be pressed to construe the word "amend" in relation to the power to make delegated legislation. In this regard the following observations of the Supreme Court in Accountant General and anr vs Doraiswamy (supra) are pertinent:

> "7. The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In B. S. Vadera v. Union of India this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstance that the power conferred under the proviso to Article 309 was

intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject- matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by

> Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the Rules of 1974 cannot have retrospective operation, and therefore sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on July 27, 1956 must be held ultra vires."

The reliance placed on the power to regulate under section 3 of the Act is equally misconceived. Section 5 gives express power to formulate the policy and to amend it. This is specific power. The power to regulate therefore cannot be read as a power to amend when a specific power to amend is given. If the power to regulate does not include the power to amend retrospectively such a power cannot be read into section 3 of the Act.

27. Section 2l of the General Clauses Act on which reliance is placed by learned Additional Solicitor General is also of no assistance to sustain the retrospective operation of the notification . Section 2l of the General Clauses Act embodies a

rule of construction, nature and extent of application of which must inevitably be governed by the relevant provisions of the statute which confers power to issue the notification. The said power must be exercised within the limits prescribed by the provisions conferring the said power. (See Gopichand vs Delhi Administration,AIR l959 SC 609, Lachmi Narayan and ors vs Union of India and ors, (l976) 2 SCC 953 and State of Kerala and ors vs. K G Madhavan Pillai and ors, (l988) 4 SCC 669)). The ratio in H.C.Suman's case also cannot be applied because in that case it was found that section 88 of the Delhi Cooperative Societies Act,l972 contained the power to exempt and if the provisions of section l2 of the said Act were to be exempted the provisions which provided that byelaws are effective from the date of registration. the notification issued under section 88 would exempt it and section 88 would contain the power to exempt retrospectively. Similarly section l4 of the General Clauses Act has no application as it merely provides that where any power is conferred on the Government, then that power can be exercised from time to time as occasion requires.

28. Under the scheme the status holder is eligible

for benefits upon achieving the incremental growth of 25% of the FOB value of exports in the current year over the previous year. It therefore follows that no sooner the status holder achieves 25% incremental growth, the status holder would be entitled to the benefits under the scheme. Immediately upon attaining the prescribed incremental growth, the status holder becomes eligible to certificate for duty free import and thereby a right vests in the exporter to receive the same. The Government may have as measure of administrative expediency provided for issue of duty free certificate only from lst April 2004 but that does not mean that no right is already vested.

29. In Bejgam Veeranna Venkata Narasimloo and ors vs State of A.P and ors (supra) the Supreme Court was dealing with a case of fixation of procurement price of rice. The State Govt. by Notification dated 24th February, 1977 while amending the scheme provided that it shall be deemed to have come into force on a date prior thereto which was 7th September, 1976. Despite an express provision in the notification giving it retrospective effect, the High Court negatived the submission that subordinate legislation could not be retrospective on the ground

that by the concerned notification the Government did not reduce in any way the price legally payable because there was no such price in existence nor did it alter any way the legal rights. Allowing the appeal, the Court held that since the rice was sold under the procurement order and a right to be paid in terms of that order had accrued to the seller as soon as sale of rice was effected, the State Government could not disturb the vested right in any way by subordinate legislation. The Court observed in para 19 read as follows:

> "19. We are unable to follow how the High Court could come to the conclusion that the vested right of the appellants had not been disturbed in any way by the subordinate legislation. Rice has been sold under a procurement order and a right to be paid in terms of that Order had accrued to the seller as soon as sale of rice was effected. As a matter of fact, the FCI did pay the appellants the price for the rice purchased. If a portion of the price paid by the FCI is taken away, the appellants will be prejudicially affected. They not only

> had acquired a vested right to be paid but actually received payment for the rice sold. If the rice was delivered without any valid procurement order, the sellers were entitled to be paid at the market rate in terms of Section 70 of the Contract Act. The retrospective subordinate legislation has tried to take away a portion of the money the appellants had lawfully obtained."

30. In Samtel India Limited Vs. Commissioner of Central Excise (supra) the appellants had paid the duty on imports and as the export was under a bond under the rules prevailing upto February, 1997 the appellants would have been entitled to a refund of duty because no adjustment was possible. However, with effect from 1st March, 1987 the Rule was amended. The appellants filed claim for refund which was rejected on the ground that under the amended sub-rule (17) the credit has lapsed and the same could not be allowed. This view prevailed with the CEGAT which by the impugned order dismissed their appeals. In appeal the Supreme Court held as under:

> "7. Thus, the then sub-rule 4A is

identical to sub-rule 17 which is under consideration. In Eicher Motors case (supra), it has been held that the assessee became entitled to take the credit on the input having been received in the factory on the basis of the existing Scheme. It is held that the right to credit became absolute when the input was used in the manufacture of the final product. It is held that the incident following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured product. It is held that if such a situation is sought to be altered necessarily it follows that right which accrued to a party gets affected. It is held that the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applicable and under which the assessee had availed of the credit facility for payment of taxes. It is held that the right which accrued to the assessees on

> the date when they paid the taxes would continue until the facility available thereto gets worked out or until those goods existed. It is held that the amended sub-rule could not be applied to the goods manufactured prior to 16th March, 1995 (date on which sub-rule 4A came into existence).
>
> 8. The principles laid down in Eicher Motors case (supra) are fully applicable, here....."

3l. In Adani Exports Ltd vs Union of India the question before the Division Bench of the Madras High Court was whether the authorities were justified in not calculating the credit in the light of the new norms particularly when in the new policy there was no scope or mention or reference to the passbook scheme at all. The Division Bench held as follows:

> "The right of credit was immediate on the exports made. If an exporter could bring in whatsoever goods on the basis

> of the credits, there can be no question of seeking any nexus in the concepts of import and export and if there is no nexus or a liability to import either prior to the export or after it, it will have to be necessarily inferred that the entitlement of the credit was immediate on the export subject to, of course, calculations made by the competent authority on the basis of the norms then in existence. We do not see as to why the exporter had to wait for those credits. All these would further suggest that the subsequent policy, which did not provide for the facility of Pass Book Scheme, was totally alien to the working which was provided in the Pass Book Scheme."

32. Learned Additional Solicitor General urged that in view of the definition of "licence" under section 2(j) of the Act, duty free entitlement certificate is to be regarded as a licence under the Act. Unless a licence is granted no right is vested in the petitioners. He relied upon the judgment of the Supreme Court in S.B International Ltd and ors and

PTR Exports (Madras) Pvt Ltd and ors vs Union of India and ors and State of Rajasthan vs J K Udaipur Udyog (supra). We are afraid that these judgements have no application to the facts of the present case. The question that fell for consideration there was whether a vested right accrued to the applicant for issuance of an advance licence on the basis of the norms obtaining on the date of application. The Court held that the duty free import of raw materials etc is permitted to enable the exporter to sell his goods abroad at more competitive price, thereby fetching foreign exchange for the country. It is a facility provided by the Government-an incentive. Mere filing of an application does not create a vested legal right to obtain licence according to the value addition norm in vogue on the date of application. It is the date of licence that is relevant and not the date of application therefor. That was not a case where the policy had provided that person exporting goods of a particular value shall be entitled to export licence of a particular value. In fact in S.B International's case in para 8, the Court observed:

> "The situation could have been different if the policy had said that a person

> exporting goods of a particular value shall be entitled to an import licence of a particular value; in such a case, the export of goods can be said to create a right in the applicant to get an import licence of the specified value."

33.' The decision in S.B.International's case thus supports the case of Mr. Dada rather than learned Additional Solicitor General. The judgment in J K Udaipur Udyog is also inapplicable since in that case, the assessee had given an undertaking for claiming exemption subject to the decision of the State Level Screening Committee and hence there was no question of taking away of a vested right. The real question would be as to when the right of the petitioners crystalised under the provisions of the scheme. In our view the status holder would acquire the vested right immediately upon achieving the prescribed incremental growth and any changes made subsequently cannot have the effect of taking away the benefits available to the status holder under the scheme. The fact that duty free entitlement certificate would be issued only after lst April 2004 and thereafter the status holder would be

entitled to the benefit under clause (vi) of the policy makes no difference to the position once the right to receive duty free entitlement is crystalised on achieving the prescribed incremental growth . The certificate is only recognition of such entitlement and issue of certificate upon the application made by the status holder is only a ministerial act.

34. In para 20 of the judgment in Adani Exports Ltd vs Union of India, the Division Bench of the Gujarat High Court observed as under:

> "We also do not find anything in the subsequent policy or the SION thereunder suggestive of any clarification as tried to be contended before us. If there was any intent to clarify, it could have been done separately and independently also or even in the new policy. Therefore, an argument that the entry in the SION was of a clarificatory nature and, therefore, would govern even the earlier exports cannot be countenanced particularly in view of the total absence of the Pass Book Scheme in the

> subsequent EXIM policy or in the absence of any specific provision for such an explanation."

The Division Bench, however, proceeded to hold that the Notifications dated 21st/24th April, 2004 are merely retroactive and not retrospective. We may hasten to add that the Division Bench struck down the Notifications dated 2lst/23rd April 2004 as far as the free shipping bills and gold, silver and jewellery are concerned on the ground that exclusion of these items was unjustified and unreasonable. With great respect to the learned Judges we are unable to agree with the view that the amendment is merely retroactive. Once it is shown that the Central Government does not have the power to give retrospective effect to the amendment which is introduced in exercise of power conferred by sec.5 of the Foreign Trade Act then whether the said amendment is retro-active or retrospective is rather immaterial. The amendment has clearly an impact on the rights which are already crystalised. We have therefore no hesitation to hold that the Notifications dated 2lst and 23rd April 2004 would have prospective operation only.

35. Before parting with the matter we may mention that the issue of promissory estoppel raised in the petition is not seriously pressed in view of the decisions of the Supreme Court in Kasinka Trading and anr vs Union of India and The Sales Tax Officer vs Shree Durga Oil Mills (supra). We may also mention that a challenge is also raised by the petitioners to the levy of fees by the DGFT on the basis of the value of the application for duty free certificate and we find absolutely no substance in the said challenge.

35. In the result the petition is partly allowed. Public Notice dated 28th January 2004 is quashed and set aside. As far as Notifications dated 2lst and 23rd April 2004 are concerned, it is declared that the said notifications will have only prospective operation and the exports made by the petitioners prior to the said notifications in respect of the classes of goods covered by the said notifications shall be liable to be computed for the purpose of determining the entitlement of the petitioners. No order as to costs.